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*Attorneys for Creditor KJH & RDA Investor Group, LLC*

**UNITED STATES BANKRUPTCY COURT  
 FOR THE DISTRICT OF NEVADA**

In re:	Case No. 15-13706-abl Chapter 11
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TURNBERRY/MGM GRAND TOWERS, LLC, <input checked="" type="checkbox"/> Affects this Debtor.
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In re:	<b>JOINTLY ADMINISTERED UNDER          CASE NO.: 15-13706-abl</b>
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TURNBERRY/MGM GRAND TOWER B., LLC, <input checked="" type="checkbox"/> Affects this Debtor.
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Case No. 15-13708-abl Chapter 11
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In re:
TURNBERRY/MGM GRAND TOWER C, LLC, <input checked="" type="checkbox"/> Affects this Debtor.

Case No. 15-13709-abl Chapter 11
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KJH & RDA INVESTOR GROUP, LLC, et al.,  Plaintiffs,
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Adversary No. 15-01123-abl
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**ANSWER AND RESPONSE TO  
 NOTICE OF REMOVAL**

v.
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TURNBERRY/MGM GRAND TOWERS, LLC, et al.,  Defendants.
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<u>Scheduling Conference:</u> Date: December 8, 2015 Time: 9:30 a.m.
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Creditors KJH & RDA Investor Group, LLC, and those individuals and entities listed on Exhibit A hereto ("Plaintiff Claimants"), by and through their counsel, Thomas H. Fell, Esq. of the law firm of Fennemore Craig, hereby submit their Answer and Response to Notice of Removal [ECF No. 94].

**I. Answer to Factual Background**

1. Answering paragraphs 1, 2, 3 and 4 of the Notice of Removal, Plaintiff Claimants admit the allegations contained therein.

2. Answering paragraphs 8 and 19, Plaintiff Claimants defer to the State Court docket for the accuracy of the allegations contained therein.

3. Answering paragraphs 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, and 23, Plaintiff Claimants deny the allegations contained therein.

4. Answering paragraph 18, such paragraph does not contain any factual allegation requiring a response from Plaintiff Claimants.

**II. This Court does not have original jurisdiction as the claims are non-core claims.**

The bankruptcy court's subject matter jurisdiction is defined by statute. Under 28 U.S.C. § 1334(b), a bankruptcy court has jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.” The strong presumption against removal means the removing party bears the burden of establishing federal jurisdiction and that removal was proper. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992).

Pursuant to 11 U.S.C. 157(b), this Court may only hear and determine cases that are deemed "core" proceedings. There are three ways to classify a proceeding as “core.” First, cases “arising under title 11” are considered core. 28 U.S.C. § 157(b)(1). Second, cases “arising in a case under title 11” are considered core. *Id.* Third, 28 U.S.C. § 157(b)(2) provides a non-exhaustive list of core proceedings.

Courts within the Ninth Circuit have stated that “arising in” jurisdiction refers to administrative matters that arise in the course of a bankruptcy case. *In re Eastport Associates.*, 935 F.2d 1071, 1076 (9<sup>th</sup> Cir. 1991); *Sedlachek v. Nat'l Bank (In re Kold Kist Brands, Inc.)*, 158 B.R. 175, 178 (C.D.Cal.1993). Other courts have addressed the meaning of “arising in” and “arising under,” holding that a proceeding is a “core proceeding,” falling under the bankruptcy court's jurisdiction, “if it invokes a substantial right provided

1 by title 11 or it is a proceeding that, by its nature, could arise only in the context of a  
2 bankruptcy case.” *In re Leco Enterprises*, 144 B.R. 244, 248–49 (D. S.D.N.Y.  
3 1992) (citing *In re Wood*, 825 F.2d 90, 96–97 (5th Cir.1987)).

4 In general, a rule of thumb for whether a proceeding is “core” is that where the  
5 proceeding could exist outside of bankruptcy it is “non-core.” *Eastport Assoc.*, 935 F.2d  
6 at 1077. A core proceeding is “an action [that has] ... as its foundation the creation,  
7 recognition, or adjudication of rights which would not exist independent of a bankruptcy  
8 environment.” *In re Leco Enters.*, 144 B.R. at 249 (quoting *Acolyte Electric Corp. v. City*  
9 *of New York*, 69 B.R. 155, 173 (Bankr.E.D.N.Y.1986), *aff’d*, 1987 WL 47763  
10 (E.D.N.Y.1987)).

11 The state law claims in this proceeding do not fall under any of the categories listed  
12 in § 157(b)(2). The only possible argument that the claims are covered by the §  
13 157(b)(2) list is that they fall under either § 157(b)(2)(A) (“matters concerning the  
14 administration of the estate”) or § 157(b)(2)(O) (“other proceedings affecting the  
15 liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity  
16 security holder relationship....”)

17 However, the Ninth Circuit has ruled that these “catch-all” provisions should be  
18 strictly construed. *Piombo Corp. v. Castlerock Prop. (In re Castlerock Prop.)*, 781 F.2d  
19 159, 162 (9th Cir.1986) ( “... we hold that state law contract claims that do not specifically  
20 fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-  
21 (N) are related proceedings under § 157(c) even if they arguably fit within the literal  
22 wording of the two catch-all provisions, sections 157(b)(2)(A) and (O).”)

23 The State Action is not core because none of the claims asserted fall under any of  
24 the enumerated provisions of Section 157(b). Specifically, Section 157(b)(2)(A) is not  
25 implicated because adjudication of the Plaintiff Claimants’ claims against the non-debtor  
26 parties will not impact the administration of the estate. The Debtor invokes this provision  
27 with absolutely no analysis and baldly states that Section 157 (b)(2)(A) renders this matter  
28 core.

1 Further, Section 157(b)(2)(B) is inapplicable as the State Action has nothing do  
2 with the adjudication of claims against the estate. Rather, the Plaintiff Claimants have  
3 asserted state law claims against non-debtor third parties. The fact that these causes of  
4 action arise out of a similar set of facts does not impart this Court with jurisdiction over  
5 the State Action. *See In re Spokane Raceway Park, Inc.*, 392 B.R. 451, 457 (Bankr. E.D.  
6 Wash. 2008). Any determination by the Nevada state court as to the Plaintiff Claimants'  
7 claims against the third party non-debtor parties will not adjudicate their claims in the  
8 estate. Again, Debtor cites to this provision as a basis for jurisdiction but provides  
9 nothing for this Court to actually analyze.

10 Finally, Section 157(b)(2)(O) similarly fails to impart jurisdiction. Section  
11 157(b)(2)(O) must be narrowly construed and as discussed above is inapplicable to state  
12 law contract and tort claims like the ones asserted by the Plaintiff Claimants against the  
13 third party non-debtor defendants. Accordingly, the State Action is not a core proceeding  
14 and this Court lacks jurisdiction.

15 **III. This Court does not have "related to" jurisdiction over the removed**  
16 **causes of action.**

17 Debtor has asserted that the State Action is "related to" this bankruptcy, and  
18 therefore, this Court has jurisdiction to hear and administer the State Action. Despite,  
19 Debtor's allegations, "related to" jurisdiction is not limitless. The Debtor is not a party to  
20 the State Action and therefore it has zero impact on the estate. To be clear, while the  
21 Debtor was initially named in the State Action, it is no longer a party in the State Action  
22 that is proceeding to discovery and trial in State court. Accordingly, this Court lacks  
23 jurisdiction over the State Action.

24 In addition to jurisdiction over matters "arising in" or "arising under" title 11, the  
25 bankruptcy court also has jurisdiction over "those proceedings that are 'related to' a  
26 bankruptcy case." Under the *Pacor* test, a bankruptcy court has "related to" jurisdiction  
27 over a matter if:  
28

1 the outcome of the proceeding could conceivably have any  
2 effect on the estate being administered in bankruptcy. Thus,  
3 the proceeding need not necessarily be against the debtor or  
4 against the debtor's property. An action is related to  
5 bankruptcy if the outcome could alter the debtor's rights,  
6 liabilities, options, or freedom of action (either positively or  
7 negatively) and which in any way impacts upon the handling  
8 and administration of the bankrupt estate.

9 *Fietz v. Great W. Savings (In re Fietz)*, 852 F.2d 455, 457 (9th Cir.1988) (citing *Pacor,*  
10 *Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984). The United States Supreme Court  
11 endorsed *Pacor's* conceivability standard with the caveats that "related to" jurisdiction  
12 "cannot be limitless," and that the critical component of the *Pacor* test is that "bankruptcy  
13 courts have no jurisdiction over proceedings that have no effect on the estate of the  
14 debtor." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 & n. 6 (1995). *In re Sihabouth*,  
15 2014 WL 2978550, at \*4 (9th Cir. BAP July 2, 2014).

16 While the limits of "related to" jurisdiction are vague, the more a debtor must  
17 stretch to find an "effect" on the estate, the greater the chance that a trial or appellate court  
18 will find subject-matter jurisdiction wanting. *In re Eads*, 135 B.R. 387, 393 (Bankr. E.D.  
19 Cal. 1991). Moreover, the risk that an appellate court may disagree with a finding of  
20 jurisdiction operates as a limiting factor on findings of relatedness by trial courts that can  
21 ill-afford wasting trial time on disputes they lack jurisdiction to entertain. *Id.* The  
22 existence of shared facts between the claims in the removed action is not sufficient to give  
23 rise to "related to" jurisdiction. *In re Spokane Raceway Park, Inc.*, 392 B.R. 451, 457  
24 (Bankr. E.D. Wash. 2008).

25 Debtor has asserted that the alleged indemnity claims asserted by the MGM  
26 Entities are sufficient to give rise to "related to" jurisdiction. Plaintiff Claimants are  
27 unaware of any alleged indemnity claims, and no such claims have been pled in any of the  
28 pending actions to date. Nevertheless, courts in the Ninth Circuit have rejected "related

1 to" jurisdiction in situations similar to this one. The court in *In re Neff* upheld the trial  
2 court's determination that the asserted indemnity claims against the Debtor were not  
3 sufficient to grant the court "related to" jurisdiction. 2013 WL 1897019 (9<sup>th</sup> Cir. BAP  
4 2013). Specifically, the BAP stated "the possibility of an indemnity or contribution claim  
5 against Debtor or the estate, which existed only to the extent that [the indemnified party]  
6 was first determined liable, was insufficient to establish jurisdiction." *Id.* at \*5. Important  
7 to the BAP was the lack of any actual contractual liability on the part of the debtor to  
8 indemnify the other defendant. *Id.* at \*6.

9 Debtor further contends that joint and several liability amongst defendants creates  
10 "related to" jurisdiction. However, Debtor is not a party to the State Action and therefore  
11 cannot be held joint and severally liable with the defendants. In *Pecor*, the Third Circuit  
12 held that "related to" jurisdiction did not exist. The debtor in *Pecor*, was not a party to the  
13 removed action and therefore determinations in the removed action could not be binding  
14 on the debtor or its estate. The court in *Pecor* went on to hold that "[e]ven if the removed  
15 action is resolved in favor of [Plaintiff] (thereby keeping open the possibility of a third  
16 party claim), [Debtor] would still be able to relitigate any issue, or adopt any position, in  
17 response to a subsequent claim by [Defendant]. Thus, the bankruptcy estate could not be  
18 affected in any way until the [Defendant-Debtor] third party action is actually brought and  
19 tried." *Pacor*, 743 F.2d at 995.

20 The Ninth Circuit BAP in *In re Aci-HDT Supply Co.* also rejected "related to"  
21 jurisdiction where the debtor was not a party to the litigation. 205 B.R. 231, 238 (9th Cir.  
22 BAP 1997). In *ACI-HDT*, the debtor removed litigation to which it was not a party to the  
23 bankruptcy court. The court ultimately held that it lacked "related to" jurisdiction because  
24 "[t]he debtor is not named as a defendant in the state action. The claims are based solely  
25 in state law and seek redress for conduct of the defendants for which they are jointly and  
26 severally liable. Most importantly, this is not a situation where the appellants are  
27 attempting to usurp causes of action that a trustee would have." *Id.* Because the debtor  
28 was not a party to the litigation the court also noted that it would not be bound by



1 determinations in the removed litigation and therefore there was no effect on the estate.  
2 *Id.*

3 At issue in the State Action are the Plaintiff Claimants' claims against third party  
4 non-debtor entities. The resolution of these claims does not determine the Debtor's rights  
5 and obligations vis-à-vis the Plaintiff Claimants or the third party non-debtor defendants.  
6 Res judicata and collateral estoppel are inapplicable to proceedings against the Debtor  
7 related to the State Action. Accordingly, there is no "related to" jurisdiction for this Court  
8 to invoke and the matter must be remanded to state court.

9 **IV. Plaintiff Claimants do not consent to final orders entered by this Court.**

10 The State Action is composed entirely of state law claims. This Court, even if it  
11 has jurisdiction, lacks constitutional authority to adjudicate. *See Stern v. Marshall*, 564  
12 U.S. \_\_\_, 131 S.Ct. 2594 (2011). Pursuant to the Court's recent decision in *Wellness*  
13 *International Network, Ltd. v. Sharif*, 575 U.S. \_\_\_, 135 S.Ct. 1932 (2015), this Court's  
14 lack of constitutional authority may be solved by knowing and voluntary consent of the  
15 parties. Accordingly, Plaintiff Claimants do not consent to adjudication by this Court of  
16 any claim over which the Court does not have constitutional authority, and pursuant to LR  
17 9014.2, do not consent to entry of final orders or judgment by the bankruptcy judge.

18  
19 DATED this 14th day of August, 2015.

20 FENNEMORE CRAIG, P.C.

21  
22 By:  

23 Thomas H. Fell  
24 Anthony W. Austin  
25 Attorneys for Plaintiffs.

**EXHIBIT “A”**

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